No. 12002

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Ida May Talbot,

Appellant,

vs.

City of Pasadena, a municipal corporation, Charles C. Hamill, A. Ray Benedict, A. E. Abernethy, Milton S. Brenner, Joseph A. Sprankle, Jr., Albert I. Stewart and Carl G. Wopschall, individually and as members of the Board of Directors of the City of Pasadena, O. A. Dietrich, individually and as Secretary of the Pasadena Fire and Police Retirement System, and Ernest F. Coop, Charles H. Kelley and W. E. Anderson, individually and as former members of the Fire and Police Pension Board of the City of Pasadena and William Schlossberg,

Appellees.

BRIEF OF APPELLEES.

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CITY OF PASADENA, a municipal corporation, CHARLES C. HAMILL, A. RAY BENEDICT, A. E. ABERNETHY, MILTON S. BRENNER, JOSEPH A. SPRANKLE, JR., ALBERT I. STEWART and CARL G. WOPSCHALL, individually and as members of the Board of Directors of the City of Pasadena, O. A. DIETRICH, individually and as Secretary of the Pasadena Fire and Police Retirement System, and ERNEST F. COOP, CHARLES H. KELLEY and W. E. ANDERSON, individually and as former members of the Fire and Police Pension Board of the City of Pasadena and WILLIAM SCHLOSSBERG,

Appellees.

BRIEF OF APPELLEES.

Preliminary Statement.

This is an appeal from a judgment of the District Court dismissing the complaint for lack of jurisdiction upon motion of appellees. [Tr. p. 34.]

It is alleged in the complaint that Edgar R. Talbot, deceased husband of appellant, was a member of the Fire Department of the City of Pasadena and died as a result of a wetting received in line of duty. Demand was made for the payment of a pension. Appellant and appellees agreed that the case had been tried in the state courts approximately in the year 1934 and that judgment was rendered against appellant. [Tr. p. 32.]

Statement of the Case.

It is alleged in the first cause of action that appellant and appellees, except the City of Pasadena, a municipal corporation, are citizens of the State of California; that the amount involved is in excess of $3,000.00, exclusive of interest and costs; that the action is brought to recover damages for the infringement of appellant's civil rights and is within the jurisdiction of the District Court as a suit arising under the Constitution and laws of the United States; and that appellant has a vested and continuing equitable right of property in and to a certain trust fund held by appellees under the provisions of the Charter of the City of Pasadena. [Tr. pp. 2-3.]

It is also alleged that the property right and claim of appellant is based upon the fact that her deceased husband died on April 15, 1930, "as a result of a wetting received in line of duty" and that the proof of her said claim and her demands were submitted to appellees from 1930 to and including 1948 and that appellees arbitrarily and without right or justifiable legal execution refused to award her a

pension pursuant to Section XI, Subdivision (F) of the Charter of the City of Pasadena. [Tr. p. 4.]

In paragraph (f) of the first cause of action appears the following quotation from the Charter provision aforesaid:

> "Whenever any member of either Department shall lose his life, while in the performance of his duty, or as the direct result of any injury received *inn* the performance of his duty, shall die within one hundred (100) days therefrom, then upon proof of such facts, said board shall order and direct that a yearly pension equal to one-third of the amount of the annual salary attached to the rank or position which he may have held in said department shall be paid in monthly installments in equal portions, to his widow during her life time; provided, that if such widow shall marry or die then the pension paid to-*su* such person, dying or marrying, shall cease." [Tr. p. 5.]

In paragraph (g) it is alleged that at the time of the death of Edgar R. Talbot his salary as fireman was $100.00 per month, that within six months after the death of Edgar R. Talbot appellant filed an application for a pension, that appellees failed and refused under color of state law to make payment of said pension, that appellant at various times "each year from 1930 to 1948" appeared before appellees and demanded payment of said pension and each time the appellees without right and without justifiable legal excuse and in an arbitrary and unreasonable manner refused to award appellant the pension to which

she was entitled to appellant's actual damage in the sum of $14,000.00. Appellant seeks punitive damages in the sum of $50,000.00. [Tr. pp. 5-7.]

In the second cause of action it is alleged that appellees entered into an unlawful conspiracy to deprive appellant of her vested and continuing equitable right of property in the trust fund held by appellees and that appellees have deprived appellant of her civil rights and have denied her constitutional rights as a citizen of the United States and in so acting have under color of state law, statute, ordinance, custom, regulation and usage subjected appellant to the deprivation of her rights, privileges and immunities secured to her by the Constitution of the United States to her actual damage in the sum of $14,000.00. Appellant seeks punitive damages in the sum of $50,000.00. [Tr. pp. 7-9.]

It is alleged in the third cause of action that for the purpose of defeating appellant appellees "produced false and perjured testimony against this plaintiff, with the intent to deprive, and impede plaintiff in the assertion and prosecution of her right of property in said trust fund" and that appellees have deprived appellant of the privileges of due process of law and equal protection of the law secured to citizens of the United States by the Fourteenth Amendment, to the actual damage to appellant in the sum of $14,000.00. Punitive damages in the sum of $50,000.00 are also sought. [Tr. pp. 9-10.]

ARGUMENT.

I.

The Complaint Was Properly Dismissed for Lack of Jurisdiction.

The entire argument of appellant and the points raised in appellant's brief pertain to the question of jurisdiction. The argument seems to be that the District Court has jurisdiction because of the allegations in the complaint that it does have jurisdiction, that the action arises under the Constitution and laws of the United States and that appellant has been deprived of her civil rights and has been denied due process of law.

The complaint consists almost entirely of conclusions and does not contain any ultimate facts upon which jurisdiction could be based. No facts are alleged to indicate that a constitutional question is involved or that any civil rights were violated or that there was any denial of due process of law. Although appellant states in her complaint that various rights were violated and seeks general and punitive damages, nevertheless appellant actually seeks by her complaint to secure a pension under the provisions of the Charter of the City of Pasadena as the same existed at the time of her husband's death. Among other things the Charter provided that a pension might be granted to a widow of a member of the Fire Department if such member should lose his life while in the performance of his duty or as the direct result of any injury received in the performance of his duty, provided the death occurred within 100 days from the injury and provided further that such facts are

proved. [Tr. p. 5.] The complaint contains no allegations of such facts. The record before this court shows that the case was tried in the state courts and that judgment was rendered against the appellant. [Tr. p. 32.]

In the case of *Emmons v. Smitt,* 149 F. 2d 869, a motion to dismiss was granted. The judgment of dismissal was affirmed on appeal. The court held that a federal District Court may not proceed with any case coming before it until it has satisfied itself from the plaintiff's statement of his own case that it has jurisdiction to entertain it. The appellate court also held that the federal civil rights statute did not authorize the District Court to entertain an action by an attorney to enjoin the grievance committee from continuing with state bar proceedings against the attorney since the right to practice law was not secured by the Constitution or by any law of the United States and that it was not a property right but a privilege granted by the state. At pages 871 and 872 the court said:

> "[5] The contention that plaintiff was denied equal protection of the laws as provided by the Fourtenth Amendment is unwarranted. There is nothing of substance in the complaint that the writ of prohibition was arbitrarily or capriciously issued or with any intention of affecting the rights of plaintiff as distinguished from those of any other citizen who had been or who might be found in the same class or confronted with the same circumstances."

In the case of *Shanks v. Banting Mfg. Co.,* 9 F. 2d 116, the complaint was dismissed and plaintiff's motion for rehearing was denied. Among other things the court said:

> "We are now considering a motion for a rehearing; and we are asked to regard, as the controlling

federal statute, this much of section 24 of the Judicial Code (Comp. St. §991): 'The District Courts shall have original jurisdiction * * * of all suits * * * where the matter * * * exceeds, exclusive of interest and costs, the sum or value of $3,-000, and (a) arises under the Constitution or laws of the United States. * * *' When such a situation is present, diversity of citizenship is not essential to jurisdiction.

"In *Defiance Water Co. v. Defiance,* 191 U. S. 194, 24 S. Ct. 67, 48 L. Ed. 140, the Supreme Court observed: 'The presumption is in all cases that the state courts will do what the Constitution and laws of the United States require.' "

* * * * * * * *

"A summary of the current of authorities seems to be that a suit, to be said to arise under the Constitution or laws of the United States, within the meaning of this part of the section in question, must be one which, seen from the record, really and substantially involves a controversy as to the effect or construction of the Constitution or laws, upon the determination of which the result depends."

"Where the parties are residents of the same district, it seems that, when the contention can be made that the state agency violated the practice and Code inhibitions of the state in the act alleged to be contrary to both state and federal Constitutions, the aggrieved party is relegated, in the first instance, to his state court, if remedies are available there as comprehensive as in the federal court. Such are the facts here, assuming that the judgment was *coram non judice.* If the instant contention may be said to 'arise' under the Constitution of the United States, just as plainly does it 'arise' under that of the state, whose Code and prac-

tice offer remedies more opportune than, and just as effective as, any possible in the federal practice.

"It is sound policy, and one encouraged by the flavor of all federal adjudications, not to extend federal jurisdiction over matters equally cognizable by state tribunals unless the elements of that jurisdiction are so clearly present that the principle of comity has no place in the matter."

In the case of *Trudeau v. Barnes,* 65 F. 2d 563, the judgment of dismissal was affirmed. Among other things the court said:

"This is an appeal from a judgment dismissing on exceptions a petition in an action at law to recover damages for being deprived of the right to register as a voter in the state of Louisiana. The plaintiff is a negro, and the defendant is the registrar of voters for Orleans parish. The petition was brought under 8 USCA §43, which provides that every person who, under color of any statute, ordinance, etc. subjects any citizen to the deprivation of any right, privilege, or immunity secured by the Constitution and laws of the United States, shall be liable to any injured party in an action at law or other proper proceeding. * * * The plaintiff's allegations to the effect that the registrar acted arbitrarily stated no facts sufficient to show that he was entitled to registration.

* * * * * * * *

". . . We cannot say, and refuse to assume, that, if the plaintiff had pursued the administrative remedy that was open to him, he would not have received any relief to which he was entitled. At any rate, before going into court to sue for damages he was bound to exhaust the remedy afforded him by the Louisiana Constitution."

In the case of *Viles v. Symes,* 129 F. 2d 828, it was held that the Federal Court had no jurisdiction in an action against a Federal District Judge and others for damages for alleged malicious prosecution and false imprisonment. Among other things the court said:

> "The petition charges in substance that the defendants named entered into a conspiracy for the sole purpose of securing his indictment and conviction in the United States District Court of Colorado for violation of the Bankruptcy Act, and that such indictment and subsequent conviction, sentence, and imprisonment, were obtained by false testimony and with knowledge on the part of the appellees that the appellant was innocent of any offense whatsoever.
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> * * * * * * * *
>
> "Beyond the bare allegation that the suit arises under the First, Fifth and Sixth Amendments of the Constitution, and 18 U. S. C. A. §596, it is difficult to understand how, or in what manner, this suit arises under the Constitution or laws of the United States."
>
> * * * * * * * *
>
> ". . . It is said, 'a suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends.' (Citing cases.)
>
> "Clearly, the gravamen of the appellant's suit is one for malicious prosecution and false imprisonment. The cause of action which he attempts to assert arises from his alleged wrongful trial and conviction in a United States District Court, wherein the parties

against whom he seeks judgment are, the judge of the court, the district attorney and his assistant who prosecuted him, the witness who testified on behalf of the government, and his subsequent imprisonment pursuant to processes issued out of that court under its authority while acting in a judicial capacity. His right to recover has its genesis and is governed by the local law of the forum. True, his right to due process of law and to a speedy, fair and impartial trial, is protected by the Fifth and Sixth Amendments to the Constitution, but these rights as here asserted lurk in the background of his suit, and do not, in these circumstances, confer jurisdiction upon the courts of the United States."

The case of *Love v. Chandler,* 124 F. 2d 785, was one wherein the judgment of dismissal was affirmed. The court's opinion reads in part as follows:

"This appeal is from a judgment dismissing the appellant's complaint in an action for damages, upon the ground that the complaint fails to state a claim upon which relief can be granted. In substance, the claim stated in the complaint is that the appellees, most of whom are officers or agents of either the United States or the State of Minnesota, have engaged in a conspiracy to prevent, and have prevented, the appellant from having and holding employment under the Works Progress Administration, for which employment the appellant, as a citizen of the United States and as a poor person, was eligible and qualified; and that the appellees, in furtherance of their conspiracy, have subjected the appellant to threats, assaults, insanity proceedings and temporary wrongful deprivation of liberty.

"The appellant contends that his complaint states a claim under §47(2) and (3) of Title 8 U. S. C. A.,

authorizing actions for damages for conspiracies to deprive citizens of the equal protection of the laws or from exercising any right or privilege as a citizen of the United States, and that it also states a claim under §48 of Title 8 U. S. C. A., which authorizes the recovery of damages from any person who, having knowledge of such a conspiracy and the power to prevent it, neglects or refuses so to do. The appellant further contends that the trial court had jurisdiction of the subject matter of this action by virtue of §41(12), (13) and (14) of Title 28 U. S. C. A., which confer upon the District Courts of the United States jurisdiction of actions to recover damages for deprivation of rights in furtherance of such conspiracies as are described in §47 of Title 8 U. S. C. A.

"The trial court was of the opinion that, since this Court had held in *Love v. United States,* 108 F. 2d 43, 49, that the right of the appellant to be employed by the Works Progress Administration was not an absolute right conferred by the Constitution or laws of the United States and that the District Court was without jurisdiction to review the administrative action of which the appellant had complained in that case, the complaint in the instant action, under the rule announced in *Mitchell v. Greenough,* 9 Cir., 100 F. 2d 184, certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056, did not state a claim for damages resulting from a conspiracy to deprive the appellant of any right or privilege dependent upon a law of the United States.

"The statutes which the appellant seeks to invoke were passed shortly after the Civil War to aid in the enforcement of the Thirteenth Amendment abolishing slavery, the Fourteenth Amendment prohibiting State action the effect of which would be to abridge the

privileges or immunities of citizens of the United States or to deprive any person of life, liberty or property without due process or to deny any person the equal protection of the law, and the Fifteenth Amendment prohibiting the denial of the right to vote on account of race or color. See *Buchanan v. Warley,* 245 U. S. 60, 78, 38 S. Ct. 16, 62 L. Ed. 149. L. R. A. 1918C, 210, Ann. Cas. 1918A, 1201. The statutes were intended to provide for redress against State action and primarily that which discriminated against individuals within the jurisdiction of the United States. *Hague v. Committee for Industrial Organization,* 307 U. S. 496, 509-514, 59 S. Ct. 954, 83 L. Ed. 1423; *Hodges v. United States,* 203 U. S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; *Logan v. United States,* 144 U. S. 263, 290, 291, 12 S. Ct. 617, 36 L. Ed. 429. The statutes, while they granted protection to persons from conspiracies to deprive them of the rights secured by the Constitution and laws of the United States (*United States v. Mosley,* 238 U. S. 383, 387, 388, 35 S. Ct. 904, 59 L. Ed. 1355), did not have the effect of taking into federal control the protection of private rights against invasion by individuals. *Hodges v. United States,* 203 U. S. 1, 14-20, 27 S. Ct. 6, 51 L. Ed. 65; *Logan v. United States,* 144 U. S. 263, 282-293, 12 S. Ct. 617, 36 L. Ed. 429. The protection of such rights and redress for such wrongs was left with the States. (Citing cases.)

"The appellant does not seek redress because the State of Minnesota is discriminating against him, or because its laws fail to afford him equal protection. We have already held that he had no absolute right under the laws of the United States to have or retain employment by the Works Progress Administration. The appellant seeks damages because certain persons, as individuals, have allegedy conspired to injure him

> and have injured him by individual and concerted action. The wrongs allegedy suffered by the appellant are assault and battery, false imprisonment, and interference with his efforts to obtain and retain employment with the Works Progress Administration. The protection of the rights allegedy infringed and redress for the alleged wrongs are, we think within the exclusive province of the State. Compare *Hodges v. United States,* 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65; *Carter v. Greenhow,* 114 U. S. 317, 330, 5 S. Ct. 928, 962, 29 L. Ed. 202, 207. We agree with the trial court that the appellant has failed to state a claim upon which relief could be granted under the statutes which he has invoked. His complaint was properly dismissed."

In the case of *Snowden v. Hughes,* 321 U. S. 1, 88 L. Ed. 497, the court affirmed the judgment of dismissal for failure of the complaint to state a cause of action within the jurisdiction of the District Court. The suit was brought to recover damages for an asserted illegal refusal to certify that plaintiff had been nominated as a candidate for representative in the General Assembly of Illinois.

The cases cited by appellant are not in point. They involve racial discrimination or the deprivation of rights secured by the federal Constitution and laws. For example, the case of *Alston v. School Board,* 112 F. 2d 992, had to do with the fixing of salaries of negro teachers in public schools at a lower rate than that paid to white teachers of equal qualifications and experience and performing the same duties on the sole basis of race and color.

The case of *Hague v. Committee for Industrial Organization,* 307 U. S. 496, 83 L. Ed. 1423, cited by appellant, was concerned with the rights of freedom of speech and of peaceable assembly.

Appellant cites the case of *American Federation of Labor v. Watson,* 327 U. S. 582, 90 L. Ed. 873. In that case the court held that the Federal Court had jurisdiction since a law regulating commerce was involved.

Another case cited by appellant is that of *Bell v. Hood,* 327 U. S. 678, 90 L. Ed. 939, wherein the court held that the District Court had jurisdiction since there was involved the protection from unreasonable searches and the deprivation of liberty without due process of law.

It was held in the case of *Tunstall v. Brotherhood, Etc.,* 323 U. S. 210, 88 L. Ed. 187, cited by appellant, that the Federal Court had jurisdiction inasmuch as a federal statute regulating commerce was involved.

II.

The Cause of Action Attempted to Be Stated Is Barred by the Statute of Limitations.

The trial court could have dismissed the complaint on the ground that the Statute of Limitations had run against the alleged claim or cause of action. The Circuit Court of Appeals has the right to affirm the judgment for a reason other than that specified by the lower court. As stated in the case of *Commissioner of Internal Revenue v. Bryson,* 79 F. 2d 397, at page 402:

> "It is well settled that an appellate tribunal may affirm a case on grounds other than those which prompted the judgment below."

According to the complaint, the appellant's husband died on April 15, 1930. [Tr. p. 4.] Appellant filed her complaint in the District Court on May 14, 1948. [Tr. p. 12.] Thus a period of more than 18 years has elapsed

from the date of decedent's death to the filing of the complaint in the District Court.

Section 338(1) of the Code of Civil Procedure of the State of California provides that an action upon a liability created by statute other than a penalty or a forfeiture must be commenced within three years.

In the case of *Jones-Burget v. Burrough of Dorment,* 14 F. 2d 954, the complaint was dismissed by the trial court on the ground that plaintiff's statement of claim failed to set forth any cause of action entitling her to recover. The judgment of dismissal was affirmed by the Circuit Court of Appeals. The action was for false arrest and imprisonment and was commenced after the expiration of two years subsequent to the imprisonment. The Pennsylvania Statute of Limitations was two years.

In the case of *Foster & Kleiser Co. v. Special Site Sign Co.,* 85 F. 2d 742, the court said at pages 750 and 751:

> "In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy, but upon the injuries resulting therefrom. The fact that there may be a criminal conspiracy does not give a plaintiff an action for damages under section 7 of the Anti-Trust Law, 15 U. S. C. A. §15 note, *supra. Glenn Coal Co. v. Dickinson Fuel Co.* (C. C. A.) 72 F. (2d) 885; *Strout v. United Shoe Machinery Co.* (D. C.) 208 F. 646, 651. The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable. *Morris & Co. v. Nat'l Ass'n of Stationers* (C. C. A.) 40 F. (2d) 620. The cause of action arises when the damage is sustained and the statute of limitations begins to run at that time."

In the case of *Curtis v. Connly,* 257 U. S. 260, 66 L. Ed. 222, the complaint was dismissed by the District Court on the ground that the Statute of Limitations of the State of Rhode Island was a bar to the action. The decree was affirmed by the Circuit Court of Appeals, 264 Fed. 650. The Supreme Court affirmed said decree. Among other things the court said:

> "There is no dispute that the Statute of Rhode Island governs the case."

In the case of *O'Sullivan v. Felix,* 233 U. S. 318, 58 L. Ed. 980, the judgment dismissing an action for an assault committed in attempting to prevent plaintiff from voting was affirmed on the ground that the one year Statute of Limitations of the State of Louisiana had run against the action. Among other things the court said:

> "That the action depends upon or arises under the laws of the United States does not preclude the application of the statute of limitations of the state is established beyond controversy by cases cited by the circuit court and by *McClaine v. Rankin,* 197 U. S. 158, 49 L. Ed. 702, 25 Sup. Ct. Rep. 410, 3 Ann. Cas. 500.
>
> "It is therefore not necessary to pursue in detail the argument of plaintiff based on the postulate that 'the Sovereign alone can limit the right of action,' and that because injury was inflicted on him in the course of violating Federal laws the limitation of the state could not apply. Congress, of course, could have, by specific provision, prescribed a limitation, but no specific provision is adduced. The limitation

of five years is asserted on the ground that the action is for a penalty, and that it is such is deduced from the provisions of title 24 of the Revised Statutes. (U. S. Comp. Stat. 1901, p. 1259), securing equal civil rights to all citizens."

In the case of *Keen v. Mid-Continent Petroleum Corp.* (1945), 58 Fed. Supp. 915, the court held that the Iowa Statute of Limitations applied in an action for recovery of overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938, 29 U. S. C. A., Sec. 201, *et seq.* At pages 917 and 918 the court said:

> "The parties do not seem to be in dispute but what it is the general rule that where a Federal statute provides for a right and Congress has not prescribed any period of limitation, that the valid applicable state statutes of limitations are to be applied."
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> * * * * * * * *
>
> "It should be noted that there are a number of rights given under Feedral statutes where Congress did not prescribe any period of limitation and which are governed by the applicable state statutes of limitations. * * *
>
> "(2) Actions for deprivation of civil rights or for conspiracy to deprive persons of civil rights. 8 U. S. C. A. §§43, 47, see *O'Sullivan v. Felix,* 1914, 233 U. S. 318, 34 S. Ct. 596, 58 L. Ed. 980; *Mitchell v. Greenough,* 9 Cir., 1938, 100 F. 2d 184, certiorari denied 306 U. S. 659, 59 S. Ct. 788, 83 L. Ed. 1056."

Conclusion.

It is submitted that the complaint demonstrates on its face:

1. That the District Court does not have jurisdiction over the subject matter referred to in the complaint.

2. That the applicable three year Statute of Limitations of the State of California has run against the alleged cause or causes of action.

It is therefore respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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